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No. 90-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SAM WHITFIELD, JR., LINDA WHITFIELD, P.L. PERKINS, JULIOUS MCGRUDER, GEORGIA M. VARNER, ANNIE SYKES, OLLIE JENNINGS, and SAM BENNETT,
Petitioners,

v.

BILL CLINTON, Governor of Arkansas, W.J. MCCUEN, Secretary of State of Arkansas, THE PHILLIPS COUNTY BOARD OF ELECTION COMMISSIONERS, THE DEMOCRATIC PARTY OF ARKANSAS, THE DEMOCRATIC STATE COMMITTEE, and THE PHILLIPS COUNTY DEMOCRATIC COMMITTEE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973, prohibit the use of a runoff primary requirement in a county where blacks constitute 47 percent of the voting-age population but where:

- black candidates who win the initial primary are *always* defeated in the runoff primary by the white candidate who had originally finished behind them;
- black citizens were historically disenfranchised on account of race or color;
- blacks continue to suffer disproportionately from the legacy of past discrimination; and
- voting patterns are characterized by extreme racial bloc voting?

2. Did the courts below err in creating a *per se* rule

that section 2 of the Voting Rights Act as amended does not protect black voters if black citizens are a bare majority of the total population within the relevant jurisdiction, even when blacks are *not* a majority of the population of voting age?

3. Are State executive branch officials, who certify election results and otherwise administer state election laws, proper parties defendant in a challenge to those state laws under section 2 of the Voting Rights Act?

LIST OF PARTIES

The names of all the parties to the proceedings below appear in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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OPINIONS BELOW

The opinion issued by the Court of Appeals sitting *en banc* is reported at 902 F.2d 15, and is contained in the

Appendix at page 1a. The opinion of the Court of Appeals panel is reported at 890 F.2d 1423, and is contained in the Appendix at page 3a. The memorandum opinion of the district court dismissing petitioners' challenge to the primary runoff statute is reported at 686 F. Supp. 1365, and is contained in the Appendix at page 58a. The order of the district court dismissing petitioners' challenge to the general election runoff statute and dismissing the Governor and Secretary of State as party defendants is unreported; it and relevant portions of the transcript of the district court's oral ruling are contained in the Appendix at page 132a.

JURISDICTION OF THIS COURT

The *per curiam* opinion of the United States Court of Appeals for the Eighth Circuit upon rehearing *en banc*, summarily affirming, by an equally divided court, the decision of the United States District Court for the Eastern District of Arkansas, was issued on May 4, 1990.

On July 26, 1990, Justice Blackmun entered an order extending the time for filing a petition for writ of certiorari to and including August 31, 1990.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the following statutes, which are set out in the Appendix at page 171a:

- Section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973
- Ark. Stat. Ann. § 7-5-106
- Ark. Stat. Ann. § 7-7-102
- Ark. Stat. Ann. § 7-7-202

STATEMENT OF THE CASE

Introduction

The Senate Report accompanying the 1982 amendments

to section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973--which this Court has described as an "authoritative" source for interpreting section 2, *Thornburg v. Gingles*, 478 U.S. 25, 43 n. 7 (1986)--expressly recognized that "majority vote requirements . . . may enhance the opportunity for discrimination against the minority." S. Rep. No. 97-417, p. 29 (1982) [hereafter referred to as "Senate Report"]. Earlier this month, in announcing that the United States has filed suit under section 2 to invalidate Georgia's primary runoff statute, Assistant Attorney General John Dunne, the head of the Civil Rights Division of the U.S. Department of Justice, described majority-vote requirements as "an electoral steroid for white candidates."[1]

In most states, a candidate wins an election or a party's nomination in a primary when he or she receives more votes than any of his or her opponents. Arkansas is one of ten

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[1]Isikoff, *U.S. Sues Georgia Over Voting Law: Widespread Effect Seen if Requirement for Runoffs is Overturned*, Wash. Post, Aug. 10, 1990, at A1, col. 1.

states, all of them in the South, and all of them with a long history of purposeful racial vote dilution, that do not follow this general rule.[2] Instead, under Arkansas law, a candidate must receive a majority of the vote cast in a primary election to obtain the nomination of a political party. Ark. Stat. Ann. § 7-7-202. If no candidate wins an outright majority of the votes cast in the first, or "preferential," primary than a second, "general," runoff primary is held between the top two vote getters two weeks later. Another statute, Ark. Stat. Ann. § 7-5-106, requires that a candidate for municipal or county office receive a majority of the vote cast to be declared the winner of a general election. Again, if no

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[2]The ten states are Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Oklahoma. *See* McDonald, *The Majority Vote Requirement: Its Use and Abuse in the South*, 17 Urb. Law. 429, 429 (1985). All of these states are subject, at least in part, to the preclearance requirements of the Voting Rights Act, 42 U.S.C. § 1973c, precisely because of their history of voting rights discrimination. *See* 28 C.F.R. § 51 appendix (1987) (listing states subject to preclearance requirements); *Jeffers v. Clinton*, No. H-C-89-004 (E.D. Ark. May 16, 1990) (three-judge court) (imposing partial preclearance requirement under section 3(c) of the Voting Rights Act on the state of Arkansas based on a finding of pervasive intentional discrimination in the adoption of general election runoff requirements).

candidate receives an outright majority, a runoff election between the top two vote getters is conducted two weeks after the general election.

This case challenges both of these runoff requirements as they operate in Phillips County, Arkansas. Petitioners are black registered voters in Phillips County. Their complaint alleged that the two runoff requirements interact with social and historical conditions to deny them an equal opportunity to participate in the political process and to elect the candidates of their choice to local and countywide office, in violation of section 2 of the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973. It further alleged that the runoff requirements had been adopted and maintained for the purpose of diluting black voting strength, in violation of section 2 and the Fourteenth and Fifteenth Amendments to the Constitution.[3]

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[3]The district court's jurisdiction was based on 28 U.S.C. §§ 1331, 1343, 2201, and 2202; and 42 U.S.C. § 1973j(f).

Statement of Facts

Phillips County, Arkansas, is a rural, heavily black county on the Mississippi River. Although a bare majority of the county's total population is black, undisputed census figures show that only 47.00% of the residents of voting age are black. App. to Pet. for Cert. at 6a & n. 1.

Despite the large number of black residents, no black candidate has received the Democratic or Republican nomination for, or been elected to, any countywide office in Phillips County since the turn of the century. *See* App. to Pet. for Cert. at 6a; *id.* at 125a.

Historically, the primary reason for the lack of black electoral success was outright disenfranchisement through such devices as physical intimidation; discriminatory literacy tests; poll taxes; a white primary; and segregated polling places. *See* App. to Pet. for Cert. at 5a; *Perkins v. City of West Helena,* 675 F.2d 201 (8th Cir.), *aff'd,* 459 U.S. 801

(1982);[4] *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark. 1988) (three-judge court), *aff'd* 109 S.Ct.541 (1988). *Cf.* App. to Pet. for Cert. at 115a (terming the history of official discrimination against black voters a "given").

Today, even when black voters do manage to surmount this legacy of discrimination--as well as the tremendous barriers that still preclude many of the county's black residents from registering and voting, *see infra* pages 16 to 18--they are still unable to nominate and ultimately to elect the candidates of their choice because of Arkansas' primary runoff requirement.

In the two most recent election cycles for countywide office in Phillips County, four black candidates, competing for separate offices, received the highest totals of votes cast in the first Democratic primary. Yet all four of those plurality winning candidates were subsequently unable to

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[4]The largest concentration of black voters in Phillips County lives in West Helena.

obtain the Democratic Party nomination because they were defeated by white candidates in head-to-head primary runoff contests. (There was no Republican opposition in the general election for any of these positions.) By contrast, no white candidate who has ever led a preferential primary in Phillips County has been defeated in a runoff. In all four black-white contests in which a black finished first in the initial election, the white candidate was able to come from behind to win the runoff.[5]

There are two major reasons why the runoff system operates to defeat black candidates: the extreme level of racial bloc voting in Phillips County and the interaction of the runoff system with the devastating poverty and continuing effects of past official discrimination that permeate the black community.

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[5]In the two black-white contests in which a white candidate won the initial election, the white candidate was able to maintain his lead in the runoff.

1. *The runoff's interaction with racial bloc voting in Phillips County*

Voting patterns in Phillips County are characterized by "extreme" racial polarization. App. to Pet. for Cert. at 107a; 116a. Petitioners' expert political scientists as well as experienced political observers of the Arkansas Delta--both white and black, Republicans and Democrats--testified without contradiction to the extraordinary levels of bloc voting.

Dr. Richard L. Engstrom, Research Professor of Political Science at the University of New Orleans, whose work on racial bloc voting has been cited with approval by this Court in *Gingles*, 478 U.S. at 53 n. 20 and 55, performed both extreme case analysis and bivariate ecological regression analysis on the fifteen county-wide, city-wide, and state legislative elections since 1984 in which both black and white candidates competed. He concluded that in all fifteen elections, voting was racially polarized as

that term was defined in *Gingles*: black candidates were supported by an average of over 94 percent of black voters, but in no contest did more than 4.9 percent of the white voters support a black candidate; in six of eight countywide races, virtually no white voters supported the black candidate.

The extreme racial bloc voting to which Dr. Engstrom testified was demonstrated once again by the results of the 1988 preferential and runoff primaries. The preferential primary took place on the second day of the trial in this case. Two black candidates sought the Democratic nomination for different countywide offices and received the support of over 90 percent of the voters in the virtually homogeneous black precincts while receiving less than 6 percent of the votes from the virtually homogeneous white precincts. Sam Whitfield came in first in a four-way race, receiving 37.4 percent of the vote, and Linda Whitfield lost a challenge to the white incumbent, receiving 42.9 percent

of the vote in a head-to-head contest.

In the runoff election two weeks later (in which Sam Whitfield, the preferential primary winner, competed and lost to the white candidate who had finished second in the preferential primary), voting was even more polarized, with Sam Whitfield receiving an average of 95.6 percent of the votes in the overwhelmingly black wards and an average of only 3.1 percent in the overwhelmingly white wards.[6]

Party officials also testified that voting in Phillips County is racially polarized. John Anderson, the chairman of the county Democratic Party, testified that race is a "more significant" factor in Phillips County politics than it used to be and that "both sides will vote for white [candidates] because they're white or a black because they're black regardless of the reputations or ability of either candidate." Bankston Waters, the head of the Republican

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[6]The results of the runoff primary were admitted into evidence as a supplemental exhibit pursuant to the district court's order.

Party in Phillips County, also stated that voting in Phillips County split along racial lines. The same conclusion--that voting in Phillips County was extremely racially polarized--was reached by every lay witness who addressed the question. Not a single witness testified to any white crossover voting in a single election contest in Phillips County.

Racial bloc voting interacts with the runoff requirement to deprive black voters in Phillips County of the opportunity to nominate and elect their preferred candidates in this fashion. The electorate in the county is primarily white. *See* App. to Pet. for Cert. at 6a, 22a, 105a. Thus, a black candidate can finish first only when the white community splits its support among two or more (invariably white) candidates. A black candidate has never received a majority of the votes cast in a primary election; at best, he or she has finished first by a plurality. The majority-vote requirement necessarily forces a black plurality winner into a head-to-

head contest against one white opponent. In such a contest, pervasive racial bloc voting has guaranteed that the white candidate will win.

For white voters, the majority-vote requirement lets them, in effect, have a separate white primary in the preference race among themselves, with the most popular white candidate being able to attract the support of all white voters in the black-white runoff. As U.S. Assistant Attorney General Dunne noted, the runoff serves as an "electoral steroid" for the remaining white candidate, by giving him or her an additional, artificially contrived, boost to win the nomination.

In any event, the majority-vote requirement has *not* in fact resulted in the winning candidate being the choice of a majority of those voting in Phillips County. Turnout in every runoff primary in Phillips County was lower than turnout in the preferential primary. In three of the four runoff primaries in which black candidates were overtaken

by whites who had finished behind them, the winner's total votes, although a majority of the votes cast in the runoff, did not represent a majority of the total votes cast in the preferential primary. (The winning total in the runoff was 46 percent of the number of votes cast in the preferential primary for county judge; the winning total in the runoff was 46 percent of the number of votes cast in the preferential primary for circuit clerk; and the winning total in the runoff was 42 percent of the number of votes cast in the preferential primary for coroner *See, e.g.*, Trial Transcript at 556-60, 563-64, 589). In fact, in one of the four runoffs, the decline in turnout was so steep that the white runoff "victor" actually received fewer total votes in the runoff than the black plurality winner had received in the preferential primary! *Id.*

2. *The runoff's interaction with other social and historical conditions in Phillips County*

Several features of the runoff system as it interacts with social and political factors in Phillips County exacerbate its discriminatory impact. Phillips County's black residents suffer from "devastating" poverty. App. to Pet. for Cert. at 119a. With respect to education and income--the socioeconomic indicators most closely correlated with political participation--blacks in Phillips County lag far behind whites.[7] Petitioners' expert, Dr. Richard L. Engstrom, testified that he had never analyzed data for an area in which the black community was as disadvantaged, in both absolute and relative terms, as it is in Phillips County.

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[7]The median years of school completed by white adults in Phillips County is 12.2, compared to 8.4 for blacks, and 58.3 percent of white adults are high school graduates, whereas only 22.9 percent of black adults are high school graduates. *Per capita* black income in Phillips County is only $2336, and the median family income in Phillips County for black families in Phillips County ($6437) is only 39 percent of the median family income for white families in the county ($16,440). A majority of black families in Phillips County (53.6 percent) have incomes below the federally defined poverty level, and over four times as many black families as white families live below the poverty line.

Access to motor vehicles and telephones is a particularly important socioeconomic indicator for political participation because these politically relevant private resources are critical to effective voter mobilization, including seeking information about registration requirements and getting out the vote on election day. The district court recognized that "not having a telephone or an automobile makes it more difficult and less convenient for a citizen to qualify for, and to exercise, his or her voting rights." App. to Pet. for Cert. at 123a. The black community has far less access to these critical resources than does the white community. While only 9.0 percent of white households have no vehicle available, and only 10.9 percent have no telephone, 42.0 percent of black households have no vehicle and 30.5 percent have no telephone.

Many poor and less educated black citizens in Phillips County were unaware of their political rights; they still believed that they must pay a poll tax to be entitled to vote.

Others, who are economically dependent on the white community, are intimidated from full participation. Some lack transportation to get to polling places, which are often located long distances from black neighborhoods. Still others, worn down by generations of racism and oppression, have a sense of futility about the efficacy of the political process. *Cf.* App. to Pet. for Cert. at 123a (recognizing that "lack of education" and feelings of "estrangement, frustration, [and] futility" are "likely bases" for nonparticipation in politics).

These socioeconomic factors interacted in five separate ways with the runoff requirement to further decrease the political efficacy of Phillips County's black citizens. First, the short period of time between the preferential election and the runoff crippled fundraising in the economically disadvantaged black community. Second, the short time period made it difficult for black candidates to educate their often politically unsophisticated supporters about the need to

return to the polls despite the black candidate's apparent victory.[8] Third, because fewer black candidates are competing in the runoff election (since the results for many offices were already determined by the preferential primary) there were fewer get-out-the-vote activities in the black community and the financial burdens on the remaining black candidates were greater. Fourth, the fact that polling places in the black community were changed, without advance notice, on the eve of the election and between preferential and runoff elections,[9] depressed black participation since many black voters were confused or discouraged from

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[8]Linda Whitfield testified that she received numerous congratulatory calls after her first place showing in the May 1986 primary, from people who did not understand that she had not yet won the nomination. Many blacks, even after being told that they had to return to the polls a second time, refused, saying "Well, the white folks are just going to take it away from you."

[9]One witness testified without contradiction that in Ward 1, West Helena, a 98 percent black precinct with the highest concentration of blacks in Phillips County, polling places were changed five times in ten election contests over a two year period.

participating.[10] Indeed, it is uncontested that in every runoff election black participation declined from its rate in the corresponding preferential election. Fifth, runoffs further polarized an already divided community.[11] In sum, the use of runoff elections in Phillips County exacerbates the numerical and socioeconomic disadvantages of the black community, while enhancing the likelihood that racial bloc voting will result in the defeat of the candidate preferred by the black community.

By contrast to the virtually certain defeat of their preferred candidates in runoff systems, black voters within

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[10]In jurisdictions covered by section 5 of the Voting Rights Act (at the time of the trial in this case Arkansas was not yet subject to section 5), changes in polling places must be approved *in advance* by either the Attorney General of the United States or the United States District Court for the District of Columbia, precisely because such changes pose the potential for intentional discrimination against minority voters or for a discriminatory impact on minority political participation. *See Perkins v. Matthews*, 400 U.S. 379 (1971).

[11]For example, using extreme case analysis, white crossover votes for black candidate Sam Whitfield decreased between the 1988 preferential primary and the 1988 runoff. Moreover, in 1986, a few store owners who initially accepted Linda Whitfield posters along with those of white candidates in the first primary refused her literature but not that of the white candidate in the runoff.

Phillips County *have* been able to elect their preferred candidates to local office under plurality-win systems. *See Perkins v. City of West Helena*, 675 F.2d 201, 203 (8th Cir.), *aff'd*, 459 U.S. 801 (1982). Thus, the presence of a runoff has a direct causal relationship to the inability of black voters in Phillips County to elect the candidates of their choice.

3. *The tenuousness of the policy underlying the use of runoff primaries*

The sole justification for the use of runoffs articulated by respondents was that it fosters the election of candidates who represent the views of a majority of the population. As we have already seen, however, the use of runoffs in Phillips County does *not* have that effect. *See supra* pages 14 to 15. In addition, however, the very structure of Arkansas' election laws shows that this is not in fact a consistent state purpose. Under the Arkansas Constitution,

the State's six "constitutional" offices--Governor, Secretary of State, Treasurer, Attorney General, Auditor, and Commissioner of Lands--may all be elected by a simple *plurality*. Indeed, in *Rockefeller v. Matthews*, 249 Ark. 341, 459 S.W.2d 110 (1970), the Arkansas Supreme Court struck down as unconstitutional an attempt to extend the majority-vote requirement to the general election for these positions. Similarly, state senators and representatives may be elected by a plurality, rather than a majority. Thus, neither the State Constitution nor any state statute applies a majority-vote requirement to these critical state positions.[12]

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[12]Not until 1975 did the state impose a majority-vote requirement in *any* local general elections; not until 1983 did it create a statewide majority-vote requirement for most county or local general elections; not until 1990 did it extend that requirement to municipal offices in all cities and towns. In all three cases, the imposition of the requirement was racially motivated: it followed directly on the heels of a black candidate's having achieved a plurality victory. *See Jeffers v. Clinton*, No. H-C-89-004 (E.D. Ark. May 16, 1990), slip op. at 24:

> "We cannot ignore the pattern formed by these enactments. Devotion to majority rule for local offices lay dormant as long as the plurality system produced white office-holders. But whenever black candidates used this system successfully--and victory by a plurality has been virtually their only chance at success in at-large elections in majority-white cities--the

The state never explained why its purported interest in majority rule is served by requiring a majority vote for nomination by a primary while permitting election by a plurality.[13]

Nor, despite the district court's suggestion, does the runoff requirement enhance coalition-building within political parties. *See* App. to Pet. for Cert. at 73a, n.1; *see also* 103a. There was no evidence in the record to suggest that

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response was swift and certain. Laws were passed in an attempt to close off this avenue of black political victory. This series of laws represents a systematic and deliberate attempt to reduce black political opportunity. Such an attempt is plainly unconstitutional. It replaces a system in which blacks could and did succeed, with one in which they almost certainly cannot. The inference of racial motivation is inescapable."

[13]The district court observed that "[i]n the hierarchy of the fundamental values of a democratic states, the manner in which political parties choose to identify their nominees for public office positions is not as important as the procedures used to control the actual election of such public officers." App. to Pet. for Cert. at 71a n. 1. With respect to the fundamental value of racial fairness contained in the Constitution and the Voting Rights Act, the district court was wrong: racial discrimination is forbidden in the *nomination* process as well as the general election itself. *See, e.g., Smith v. Allwright*, 321 U.S. 649 (1944) (white primary violates Fifteenth Amendment); Voting Rights Act, § 2(b) (violation of section 2 is established when the processes leading to "nomination *or* election" are not equally open) (emphasis added).

the desire to promote coalition-building was in fact a state policy; indeed, the respondents never mentioned such a goal. Nor, using the district court's own analysis, could enhancing biracial appeals have been a purpose in enacting a primary runoff requirement, since the requirement was adopted at a time when blacks were completely excluded from the Democratic Party, App. to Pet. for Cert. at 70a. To the contrary, the evidence showed that runoff requirements have been adopted in Arkansas because they enable the white community to exclude blacks from the coalition-building process. *See supra* note 12. Finally, the evidence is unrebutted in this case that because whites absolutely refuse to support black candidates in Phillips County, the majority-vote requirement does just the reverse--it promotes coalition building within the white community only. In the first primary, white voters can select the most popular white candidate to then coalesce behind in the runoff to defeat the black candidate. Election

returns from Phillips County showed that polarization was often more extreme in the runoff than it was in the initial election.

Course of the Proceedings Below

Petitioners' complaint challenged both Arkansas runoff statutes, claiming that they violated the results test of amended section 2 as well as the intent tests of both amended section 2 and the Fourteenth and Fifteenth Amendments.[14] After a three-day trial, in which the state attorney general represented the respondent Democratic Party organizations despite the fact that *every* state official defendant had been dismissed from the lawsuit, the district

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[14]On the eve of trial, the district court dismissed petitioners' challenge to the general election runoff on the ground that the governor and secretary of state were not proper and adequate defendants in such a lawsuit; instead, the district court held, petitioners were required to have sued the local election officials actually responsible for conducting elections and counting the ballots. *See* App. to Pet. for Cert. at 141a; *id.* at 155a. In addition, it dismissed petitioners' suit because no black candidate had in fact lost a general election in a runoff. *Id.* at 164a-167a.

court dismissed petitioners' challenge to the primary runoff statute. It concluded, first, that because blacks were a majority of the total population (although not of the electorate), they were barred as a matter of law from bringing a section 2 claim. App. to Pet. for Cert. at 107a-108a. Second, although the district court recognized that the Senate Report had expressly singled out the majority-vote requirement as a discrimination-enhancing device, it declined to give any weight to that conclusion. *See* App. to Pet. for Cert. at 118a. Indeed, it described the Senate Report factors, upon which this Court placed great weight in *Gingles* as "more [of] a distraction than a useful tool for evaluating the cause and effect operation of the challenged runoff laws." App. to Pet. for Cert. at 130a. It held, essentially, that majority-vote requirements were so central to democratic principles that they were immune from attack as racially discriminatory devices.

A divided panel of the Eighth Circuit reversed. It

found that the undisputed evidence showed that black voters were in fact a minority of the Phillips County electorate (and the district court's finding to the contrary was unsupported by any record evidence) and held that, in any event, section 2's protection was not limited to numerical minorities. *See* App. to Pet. for Cert. at 20a-22a. It further held that the district court had committed critical legal error in refusing to apply the analysis set out on pages 28-29 of the Senate Report and approved by this Court in *Gingles*, App. to Pet. for Cert. at 26a-27a. It noted the uncontested evidence regarding the presence of critical Senate Report factors--such as a history of discrimination; extreme bloc voting; "devastating" socioeconomic deprivation; the "dominati[on] over qualifications and issues" of candidates' racial identity; and the complete lack of black electoral success, App. to Pet. for Cert. at 28a-29a--and concluded that "based on the proof set forth by Whitfield and the totality of the circumstances in Phillips

County, a section 2 violation has been established under the results test." App. to Pet. for Cert. at 37a.[15]

The Eighth Circuit granted respondents' motion for rehearing *en banc*. After reargument, the court of appeals affirmed the district court by an equally divided vote.[16]

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[15]It affirmed the district court's dismissal of the challenge to the general election on the ground that petitioners had failed to show that a black candidate had been defeated in a general election runoff in Phillips County. App. to Pet. for Cert. at 37a n. 4.

[16]Five of the nine active judges on the Eighth Circuit--Chief Judge Lay and Judges McMillian, John R. Gibson, Fagg, and Beam--would have reversed the district court. App. to Pet. for Cert. at 2a. The tie was the result of the fact that Senior Circuit Judge Bright was permitted to sit because he had sat on the original panel. *See* 8th Cir. R. 16(a).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE THE LOWER COURTS WITH GUIDANCE ON HOW TO TREAT SECTION 2 CLAIMS CHALLENGING RUNOFF REQUIREMENTS

In *Gingles*, this Court did not address the question of how the lower courts should assess section 2 claims involving challenges to runoff election requirements. *See* 478 U.S. at 46 n. 12. The deadlock in the *en banc* Court of Appeals in this case, in which five circuit judges voted to affirm a district court that rejected completely the applicability of the Senate Report factors and this Court's opinions, shows how necessary further guidance from this Court is to the proper functioning of the Voting Rights Act.

All three branches of the government have repeatedly recognized the discriminatory impact of runoff requirements in jurisdictions where blacks are a minority of the electorate and racial bloc voting exists. The Senate Report

accompanying the 1982 amendment of section 2, which this Court has termed an "authoritative" source of congressional intent, *Gingles*, 478 U.S. at 43 n. 7, explicitly identifies majority vote requirements as a practice that can "enhance the opportunity for discrimination against the minority group." Senate Report at 29. *See also Voting Rights Act: Runoff Primaries and Registration Barriers: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong. 2d Sess. (1984) (collecting data and testimony regarding the discriminatory impact of runoff primaries).

This Court has also repeatedly found that runoff requirements improperly minimize black voting strength. In *City of Rome v. United States*, 446 U.S. 156 (1980), for example, this Court held that a change from a plurality-win system to a runoff system would have a discriminatory effect on black voters in Rome, Georgia:

[U]nder the pre-existing plurality-win system, a

> Negro candidate would have a fair opportunity to be elected by a plurality of the vote if white citizens split their votes among several white candidates . . . . The 1966 change to the majority vote/runoff election scheme significantly decreased the opportunity for such a Negro candidate since, even if he gained a plurality of votes in the general election, [he] would still have to face the runner-up white candidate in a head-to-head runoff election in which, given bloc voting by race and a white majority, [he] would be at a severe disadvantage.

Id. at 183-84 (bracketed materials in this Court's opinion; internal quotation marks omitted); *see also, e.g., Gingles*, 478 U.S. at 39 (discussing three-judge court's finding that North Carolina's majority-vote requirement posed "a continuing practical impediment to the opportunity of black voting minorities to elect candidates of their choice"); *City of Port Arthur v. United States*, 459 U.S. 159, 167 (1983) (striking down runoff requirement for municipal elections under § 5 of the Voting Rights Act).

Finally, the Attorney General, whose interpretations of the Act have been accorded "great deference" by this Court, *United States v. Board of Commissioners of Sheffield,*

Alabama, 435 U.S. 110, 131 (1978), has also repeatedly found that runoff requirements impermissibly diminish back voting strength. Indeed, during the period 1975-1980, the Attorney General objected, under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to the adoption of *sixty-six* separate majority-vote requirements. Only annexations and at-large elections occasioned more objections. U.S. Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals 187 (table 6.4) (1981) (compiling data regarding section 5 objections). And earlier this month, the United States filed suit against the state of Georgia, seeking the invalidation of its primary runoff statute under section 2.

The court below squarely rejected the position taken by this Court, Congress, and the Attorney General:

> It is interesting to note that the U.S. Supreme Court apparently has suggested that "majority" voting is a procedure that "may enhance the opportunity for discrimination." That is far from clear to the Court based on the evidence and authorities it has reviewed.

App. to Pet. for Cert. at 118a. In place of the intensely local, fact-specific appraisal required by Congress and this Court, it announced two novel and unsupportable legal principles. First, it rejected the applicability of the Senate Report factors to section 2 results claims. *See, e.g.*, App. to Pet. for Cert. at 130a ("the positive findings with respect to the Senate Report factors have no tendency to prove" a section 2 violation; instead, they serve as "a distraction"); *id.* at 111a (the Senate Report factors "more logically support proof relating to 'intent' issues that 'cause and effects' issues"). Second, it held that runoff requirements (which this Court has found racially discriminatory) are so fundamental a part of the American democratic system that they are simply immune from attack. *Id.* at 81a-82a.

This Court's opinion in *Gingles* provided lower courts with guidance on how to assess claims of vote dilution through submergence in multimember districts. *See Gingles*, 478 U.S. at 48-51 (setting out how the Senate Report factors

should be applied to claims that multimember districts violate section 2). However, it is clear from *Whitfield* and from the Second Circuit's opinion in *Butts v. City of New York,* 779 F.2d 141, 148-49 (2d Cir. 1985) (also holding that runoff requirements are not subject to challenge under section 2), *cert. denied*, 478 U.S. 1021 (1986), that lower courts faced with challenges to runoffs are refusing to apply the "intensely local appraisal of the design and impact of the contested electoral mechanism" based "upon a searching practical evaluation of the past and present reality" of politics within the relevant jurisdiction that this Court and Congress have mandated, *Gingles*, 478 U.S. at 79 (internal quotation remarks omitted); Senate Report at 30. This Court should grant certiorari to clarify the standards for assessing these increasingly common section 2 claims.

II. THE PER SE RULE THAT SECTION 2 DOES NOT PROTECT BLACK VOTERS IF BLACKS CONSTITUTE A MAJORITY OF THE POPULATION (BUT NOT A MAJORITY OF THE VOTING AGE POPULATION) ANNOUNCED IN THIS CASE SQUARELY CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS

According to the most recent available, uncontested, census data, blacks form a bare majority of Phillips County's total population. (They are, however, a distinct minority of the population of voting age.)[17] The court below held that, "as a matter of law, the undisputed population figures here are not such as will permit the plaintiffs to challenge the primary runoff law of the state of Arkansas as a violation of section 2 of the 1965 Voting Rights Act, as amended," App. to Pet. for Cert. at 106a-107a, since blacks were not a "minority," within the meaning of the statute.

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[17]The district court's suppositions to the contrary were clearly erroneous, as the stipulated figures from the Census Bureau show that blacks constitute 52.94 percent of the total population and 47.00 percent of the population of voting age. *See* App. to Pet. for C[illegible] at 6a. The stipulated figures also showed that the number of blacks in the county has been steadily declining over the past three decades. Finally, it was uncontested that blacks are a minority of registered voters.

That conclusion represents a complete misreading of section 2. The text of section 2 never uses the word "minority." By its terms, section 2 prohibits discrimination against "*any* citizen of the United States" on the basis of race or color, section 2(a) (emphasis added), and condemns electoral arrangements not equally open to participation by "members of a class of citizens protected by subsection (a)," section 2(b), without placing any strictures on the relative size of that class.

This rule conflicts with the decisions of this Court in two separate ways.

A. This Court Has Rejected the Use of Per Se Rules in Section 2 Cases

In *Gingles*, this Court held that in a section 2 lawsuit,

> the trial court is to consider the "totality of the circumstances" and to determine, based "upon a searching practical evaluation of the 'past and present reality,'" S. Rep. 30 (footnote omitted), whether the political process is equally open to minority voters. "'This determination is peculiarly dependent upon the facts of each case,'" *Rogers [v. Lodge,* 458 U.S.] at 621, quoting *Nevitt v. Sides*,

> 571 F.2d 209, 224 (CA5 1978), and requires "an intensely local appraisal of the design and impact" of the contested electoral mechanisms. 458 U.S., at 622.

478 U.S. at 79. "The essence of a § 2 claim," then, is "that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47.

This Court's interpretation in *Gingles*, as well as the actual outcome (which affirmed the finding of liability in four legislative districts and reversed the finding of liability in a fifth), thus clearly require jurisdiction-specific consideration of challenged electoral mechanisms, rather than the development of *per se* rules regarding the legitimacy of various practices.

Despite this clear directive, the court in this case announced a *per se* rule: "as a matter of law," regardless of social and historical conditions within Phillips County,

petitioners were barred from bringing a section 2 challenge to Arkansas' runoff requirements. App. to Pet. for Cert. at 106a-107a. Rather than discussing political reality in Phillips County, Arkansas, in 1988 or at any other time, the court's discussion focused on conditions in France, *id.* at 81a; Chile at the time of Allende's election in the 1970's, *id.* at 81a-82a; New York City during the 1970's, *id.* at 74a-78a; Virginia and Chicago, *id.* at 94a; and gubernatorial politics generally in the South between 1932 and 1977, *id.* at 99a and 102a. It relied on the experience with runoffs in these situations to hold that runoff provisions cannot be attacked under section 2. Such an approach clearly conflicts with the approach taken by this Court in *Gingles*. This Court should grant certiorari to make clear that the Voting Rights Act does not permit the erection of *per se* barriers to section 2 claims.

B. *The Specific Per Se Rule Created in this Case Conflicts with this Court's Decisions in* White v. Regester *and* Rogers v. Lodge *and with Decisions of the Fifth and Eleventh Circuits*

In this case, the court held that petitioners were barred as a matter of law from bringing a section 2 lawsuit because they were not a numerical minority in Phillips County. (In fact, blacks *are* a numerical minority of the voting-age population.) No other court has ever held that black voters are barred as a matter of law from bringing a section 2 lawsuit because black residents outnumber white residents of the relevant jurisdiction. To the contrary, both this Court and the Fifth and Eleventh Circuits have recognized that electoral arrangements can illegally diminish the voting strength of black voters even when they are a majority of the electorate.

Two of this Court's leading voting rights cases, *White v. Regester*, 412 U.S. 755 (1973), and *Rogers v. Lodge*, 458

U.S. 613 (1982), have reached precisely the opposite conclusion. *Rogers* involved a challenge to at-large elections in Burke County, Georgia, which was 53.6 percent black. *Id.* at 614. Despite this numerical superiority, the Court concluded that the system denied black voters an ability to elect their preferred candidates. And in *White*, roughly half the population of Bexar County, Texas, was Mexican-American. The *White* district court squarely rejected the idea that only numerical minorities are protected: Such a position

> misconceives the meaning of the word "minority". In the context of the Constitution's guarantee of equal protection, "minority" does not have a merely numerical denotation; rather it refers to an identifiable and specially disadvantaged group.

Graves v. Barnes, 343 F. Supp. 704, 730 (W.D. Tex. 1972) (three-judge court), *aff'd in relevant part and rev'd in part on other grounds sub nom. White v. Regester*, 412 U.S. 755 (1973); *see also* 412 U.S. at 767 (district court properly

treated plaintiffs as a minority).[18]

Moreover, the decision in this case squarely conflicts with recent holdings of the Fifth and Eleventh Circuits. In *Monroe v. City of Woodville*, 819 F.2d 507 (5th Cir. 1987), the Fifth Circuit held that the fact that blacks constitute a majority of a jurisdiction's population *cannot* as a matter of law preclude a section 2 lawsuit. *Monroe* involved a challenge to at-large elections in a city whose total population was 60.5 percent black. *Id.* at 508. The Fifth Circuit held that plaintiffs must be given the opportunity to prove that, despite this numerical predominance, they did not enjoy the equal opportunity to elect the candidates of their choice. *Id.* at 511. Similarly, the Eleventh Circuit found a

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[18] *White* was one of two cases on which the Senate relied in articulating the section 2 "results test." The other was *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (per curiam). *See* Senate Report at 23, 27-28. *Zimmer*, like *White v. Regester* involved a predominantly minority jurisdiction. East Carroll Parish, Louisiana, was roughly 59 percent black in total population, 485 F.2d at 1301. Nonetheless, there too the court found racial vote dilution.

section 2 violation in Dallas County, Alabama, which was 55 percent black in total population and 49 percent black in voting-age population. *United States v. Dallas County Commission*, 850 F.2d 1430, 1434 (11th Cir. 1988).

In sum, a clear conflict exists between the numerical threshold rule applied in this case and the approaches taken by this Court and the Fifth and Eleventh Circuits.

III. THE HOLDING BELOW THAT THE GOVERNOR AND SECRETARY OF STATE ARE NOT PROPER DEFENDANTS TO A STATUTORY AND CONSTITUTIONAL CHALLENGE TO A GENERAL ELECTION RUNOFF STATUTE CONFLICTS WITH ALMOST THREE DECADES OF THIS COURT'S DECISIONS

Petitioners' statutory and constitutional challenges to Arkansas' "systematic and deliberate attempt to reduce black political opportunity" through the enactment of a series of general election runoff statutes, *Jeffers v. Clinton*, No. H-C-89-004 (E.D. Ark. May 16, 1990) (three-judge court),

slip op. at 24,[19] was dismissed, prior to trial because the district court held that a challenge to a statewide election statute cannot be maintained against the Governor and Secretary of State as the only defendants. First, it held that plaintiffs wishing to bring such a challenge must also name the local officials physically responsible for running the elections:

> You've got to serve the people, it seems to me, who are charged with the duty of conducting the election or to effectuate the statute you are challenging. The Governor as such and the Secretary of State as such are not those people.

App. to Pet. for Cert. at 141a-142a. Second, it held that, because the duties performed by the Governor and Secretary are purely ministerial and compelled by statute, the Governor and Secretary are improper parties in any event:

> [N]o claim of wrongdoing has appropriately been asserted against those defendants . . . . [I]f the Court were to require that the defendant political county committees certify certain candidates, "the

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[19]The opinion in *Jeffers* was issued only a fortnight after the *en banc* decision in this case.

> separate defendants Clinton and McCuen cannot exercise their legal function in any way other than to issue commissions and certify candidates and results certified by local authorities."

App. to Pet. for Cert. at 155a. These holdings directly conflict with the longstanding precedents of this Court.

This Court has consistently treated governors and secretaries of state as proper and adequate defendants in voting rights cases, despite the fact that these officials neither physically conduct actual elections nor have any discretion under the state statutory schemes.

In the seminal case of *Baker v. Carr*, 369 U.S. 186 (1962), the lead defendant, Joe C. Carr, was the Tennessee Secretary of State. The duties that made him a proper defendant--furnishing envelopes and forms to county election commissions; maintaining election returns sent to him by the county commissions; and, along with the governor, declaring election results, *id.* at 205 n. 25--are identical to the duties performed by Secretary McCuen in this case. *See* Ark. Stat.

Ann. §§ 7-5-203 (secretary certifies lists of candidates to county commissions), 7-5-701(d) (secretary maintains election records); 7-5-704(a) (secretary informs governor of identity of winning candidates).

In case after case since *Baker v. Carr*, this Court has treated governors and secretaries of state as proper and adequate defendants in vote-dilution litigation. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1 (1964) (governor and secretary of state were only defendants); *Reynolds v. Sims*, 377 U.S. 533 (1964) (secretary of state); *Fortson v. Dorsey*, 379 U.S. 433 (1965) (secretary of state as only defendant); *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (governor as only defendant); *White v. Regester*, 422 U.S. 935 (1975) (governor). *Cf. Rogers v. Lodge*, 458 U.S. 613 (1982) (county commissioners elected under at-large system being challenged were proper defendants although they had nothing to do with enactment or maintainance of system or with actual running of elections); *Thornburg v. Gingles*, 478 U.S.

30 (attorney general as defendant in section 2 case). No court has ever required the actual local officials who conduct elections also to be named.

Furthermore, in none of the cases cited in the previous paragraph was there any allegation that the relevant state official had himself willfully violated federal law. In each case, the named defendants performed solely ministerial duties.

Since *Ex parte Young*, 209 U.S. 123 (1908), it has been clearly established that plaintiffs may maintain federal lawsuits against state officials that allege that those officials' performance of ministerial duties denies the plaintiffs some federal right. The fact that state law requires the officials to act as they have has *never* before been used to immunize them from a suit requiring injunctive relief. Every Term, this Court decides cases involving claims for declaratory and injunctive relief against state officials performing their duties in accordance with state law. *See, e.g., Butterworth v.*

Smith, 110 S.Ct. 1376 (1990) (state attorney general as defendant in lawsuit challenging enforcement of state grand jury secrecy statute); *Quinn v. Millsap*, 109 S.Ct. 2324 (1989) (mayor and governor as defendants in lawsuit challenging property ownership as qualification for appointment to local board); *Eu v. San Francisco County Democratic Central Committee*, 109 S.Ct. 1013 (1989) (state secretary of state as defendant in lawsuit challenging statute regulating political parties). In fact, this Court has viewed officials performing ministerial functions as appropriate defendants even in cases where the official in fact *agrees* with the plaintiff's claim but is constrained by statute. *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983).

In sum, the lower court's position in this case would require the complete abandonment of the entire structure of federal judicial review that has been erected since *Ex parte Young*. This Court should grant certiorari to make clear that plaintiffs may seek injunctions against state officials whose

ministerial acts violate federal law.[20]

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[20]The alternative ground for dismissal--that petitioners lacked standing to challenge the general election runoff statute because they had not lost an election, *as candidates*, due to the operation of the general election runoff, *see* App. to Pet. for Cert. at 155a--also squarely conflicts with congressional intent, *Gingles* and decisions of other circuits.

This Court has squarely held that section 2 *liability* (and therefore *a fortiori* standing) can be established even in cases where no minority-preferred candidate has yet been defeated by the operation of the challenged practice. "Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process." *Gingles*, 478 U.S. at 57 n. 25. This holding is critical to the operation of the Voting Rights Act, since one of the major consequences of discriminatory practices is that they *deter* the minority community from sponsoring candidates in the first place. *See, e.g., McMillan v. Escambia County*, 748 F.2d 1037, 1045 (11th Cir. 1984); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987); *Hendrix v. McKinney*, 460 F. Supp. 626, 631-32 (M.D. Ala. 1978) (Frank Johnson, J.).

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

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